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NO. 83-886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE BOARD OF EQUALIZATION OF THE STATE OF GEORGIA, *et al.*,

Petitioners,

v.

SOUTHERN RAILWAY COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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TABLE OF AUTHORITIES

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Case:

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 4

Statute:

§ 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (1976), 49 U.S.C. § 29c, recodified without material change as 49 U.S.C. § 11503, Pub. L. No. 95-475, 92 Stat. 1337, 1445-46 (1978) ... *passim*

Miscellaneous:

Note, "Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation," 67 Cornell L.Rev. 219 (1981) 3

S. Rep. No. 92-1085, 92d Cong., 2d Sess. (1972) 4

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

1. THE STATE BOARD'S STATEMENT OF THE CASE IS ACCURATE.

The State Board stands by its statement, characterized as erroneous by the railroads, that "Each railroad agreed that the State Board had jurisdiction to grant relief based upon § 306, and actively litigated its § 306 cause of action before the State Board." Petition 3. The railroads' claim is that they simply reserved their § 306 claim to prevent its waiver while they exhausted their administrative remedies under State law, R.R. Brief 2-3, but this is inconsistent with the record and the conclusions of both the District Court and the Court of Appeals. This dispute is not academic: The District Court concluded that the railroads' conduct in proceeding before the State Board was a factor worthy of consideration in deciding to abstain. Pet. App. 32a.

The record on appeal will show that each railroad raised § 306, equally with causes of action based upon State law, as a basis for its appeal to the State Board. R. 614-33.[1] Each railroad, through counsel, signed a stipulation not referring specifically to § 306 but effectively incorporating by reference the grounds set forth in the appeals. R. 635.[2] Each railroad in its brief to the Board specifically relied upon § 306. R. 735.[3] The railroads argued that they had proved their § 306 case and "are therefore entitled to relief under the provisions of the 4-R Act as well as relief under the provisions of Georgia law." R. 736.

These actions plainly go beyond reserving the § 306 cause of action for a later proceeding in U.S. District Court and both the hearing officer, R. 682-83, and the State Board, *see* R. 759, decided the § 306 claim on the merits. Moreover, the District Court necessarily concluded that the § 306 claim was presented on the merits to the State Board, because it concluded that the § 306 issue would be encompassed within any appeal to State Court. Pet. App. 33a. Finally, the Court of Appeals necessarily concluded that the § 306 claim was presented on the merits to the State Board, because it assumed that the State Board order, had it been entered, would have

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[1] *E.g.*, "Such assessment is contrary to the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C.A. Section 11503. *** For these and other reasons which will be presented at the requested hearing, taxpayer respectfully appeals the proposed assessed valuation . . . ." R. 632-33.

[2] "The railroads have timely filed their appeals to this Board. This Board has jurisdiction to hear evidence on the issues and to grant relief, redetermine values and to equalize assessment percentages, if warranted by the evidence."

[3] "[T]he railroads did in their appeal to the Board, in the alternative, rely upon the additional equalization rights conferred by act of Congress under 49 U.S.C. § 11503 (4-R Act)."

been *res judicata* and binding upon the District Court. Pet. App. 5a, n. 7.

It is fair to say that the railroads are attempting to gain two trials on a single cause of action. The District Court correctly concluded that the railroads' conduct in this regard is a factor which is worthy of consideration in deciding to abstain. Pet. App. 32a.

2. RESPONDENTS' PRINCIPAL ARGUMENT IS CONTRADICTED BY CONGRESS' VESTING OF JURISDICTION OF § 306 CASES CONCURRENTLY IN STATE AND FEDERAL COURT.

Both the railroads and the United States discuss § 306 as though Congress specifically intended that § 306 cases be brought in federal court. Not only is such an intent evidenced nowhere in the legislative history, it is affirmatively contradicted by Congress' vesting of jurisdiction of § 306 cases concurrently in state and federal court. No special congressional preference for a federal adjudication can plausibly be maintained in the absence of a grant of exclusive jurisdiction to U.S. district courts.[4]

Admittedly, a Congress holding no special preference of its own for federal court adjudication could nevertheless intend to offer plaintiffs the option of selecting a federal

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[4] The propriety of abstention in an exclusive jurisdiction case has never been decided by this Court and is not presented here. Several lower courts have abstained in exclusive jurisdiction cases, *see* Note, "Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation," 67 Cornell L. Rev. 219 (1981), even though the argument against abstention was immeasurably stronger in such cases than it is in the case at bar.

forum.[5] To argue that such an intent forbids abstention proves too much, however, because nearly every federal cause of action includes at least concurrent district court jurisdiction.[6] To accept Respondents' position is to adopt Justice Frankfurter's dissent in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and consign abstention to the dustbin in nearly every case.

Moreover, it must be remembered that all railroads in this case voluntarily raised and vigorously litigated their § 306 cause of action in their six day trial before the hearing officer. *Supra* at 1-3. The United States does not mention this aspect of the case, and the State Board does not believe that the United States means to endorse the railroads' claimed right to two trials on a single cause of action. Even assuming that Congress intended for railroads to have an absolute choice of forum in § 306 cases, the railroads here made their choice in 1979 and should not be allowed to change it now.

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[5] Such an intent need not be to offer an unconditional choice to all plaintiffs in all cases. The legislative history of § 306 suggests that district court jurisdiction was offered as an escape from the multiple suit requirements imposed by some states. S. Rep. No. 92-1085 at 8. Georgia imposes no such requirement.

[6] Respondents assert that the district court decision "would rob the jurisdictional grant of Section 11503 of all meaning." R.R. Brief 6; U.S. Brief 4, but the district court order makes it clear that, in the opinion of the district court, abstention would be inappropriate in § 306 cases filed in most other states. Pet. App. 31a. The district court's careful and correct application of *Burford* principles protects both the congressional purpose and the comity principle, and is not fairly open to Respondents' criticism.

For the reasons stated herein and in the Petition, we respectfully request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Reply Brief upon counsel for all parties who are separately represented, pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, by mailing three copies to each in envelopes addressed to:

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with first-class postage prepaid. All parties required to be served have been served.

This _____ day of _____, 1984.

_____

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